

JEFF OSTROW (*pro hac vice*)  
**KOPELOWITZ OSTROW FERGUSON  
WEISELBERG GILBERT**  
One West Las Olas Blvd., Suite 500  
Fort Lauderdale, FL 33301  
Telephone: (954) 525-4100  
Facsimile: (954) 525-4300  
*ostrow@kolawyers.com*

HASSAN ZAVAREEI (CA 181547)  
**TYCKO & ZAVAREEI LLP**  
1828 L Street, N.W., Suite 1000  
Washington, DC 20036  
Telephone: (202) 973-0900  
Facsimile: (202) 973-0950  
*hzavareei@tzlegal.com*

*Attorneys for Plaintiffs and the Settlement Class*

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

JOANNE FARRELL, RONALD ANTHONY DINKINS, and LARICE ADDAMO on Behalf of themselves and all others similarly situated,

Plaintiffs,

VS.

BANK OF AMERICA, N.A.,  
Defendant

Defendant.

CASE NO. 3:16-cv-00492-L-WVG

**MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
PLAINTIFFS' UNOPPOSED  
MOTION TO SUBSTITUTE THE  
REPRESENTATIVES OF THE  
ESTATE OF JOANNE FARRELL AS  
PLAINTIFFS AND CLASS  
REPRESENATIVES PURSUANT TO  
FEDERAL RULE OF CIVIL  
PROCEDURE 25(a)(1)**

Judge: Hon. M. James Lorenz  
Place: Courtroom 5B

Plaintiffs, Joanne Farrell, Ronald Anthony Dinkins, Tia Little and Larice Addamo (“Plaintiffs” or “Class Representatives”), through Class Counsel, and upon consent of Defendant Bank of America, N.A., respectfully request that the Court substitute Plaintiff Joanne Farrell’s children, Patrick Michael Farrell, Ryan Thomas Farrell, Timothy Gaelan Farrell, and Brooke Ann Farrell (the “Farrell Children”) as named Plaintiffs and as Class

1 Representative for Plaintiff Joanne Farrell, for the limited purpose of effectuating the Parties'  
 2 Settlement in this Action. Joanne Farrell ("Farrell") passed away January 18, 2018. Farrell  
 3 passed away intestate is survived solely by her adult children. There is no personal  
 4 representative or administrator to Joanne Farrell's estate. The Farrell Children are a proper  
 5 substitute party under Fed. R. Civ. P. 25.

## 6 **I. RELEVANT BACKGROUND AND PROCEDURAL HISTORY**

7 Plaintiffs brought this Action against Defendant Bank of America, N.A. alleging that  
 8 Extended Overdrawn Balance Charges on checking accounts violates the usury provision of  
 9 the National Bank Act. Farrell filed the case and was later joined by the other Plaintiffs after  
 10 the Court denied the Bank's Motion to Dismiss [DE # 1 and 20]. The Parties thereafter  
 11 entered into a Settlement Agreement [DE #69] on October 30, 2017. The Agreement was  
 12 signed by all the Plaintiffs, including Farrell. The Court granted Preliminary Approval of the  
 13 Settlement [DE #72] on December 11, 2017, prior to Farrell's death. The Court is set to hear  
 14 Plaintiff's Motion for Final Approval [DE #80] on June 18, 2018.

## 15 **II. ARGUMENT**

16 Substitution of the Farrell Children in place of Joanne Farrell as a class representative  
 17 should be permitted.

18 The substitution of parties after death is governed by Federal Rule of Procedure 25(a)(1)  
 19 which states:

20 (a) Death.

21 (1) Substitution if the Claim Is Not Extinguished. If a party dies and the  
 22 claim is not extinguished, the court may order substitution of the proper  
 23 party. A motion for substitution may be made by any party or by the  
 24 decedent's successor or representative. If the motion is not made within 90  
 25 days after service of a statement noting the death, the action by or against  
 26 the decedent must be dismissed.

27 "Rule 25(a) should be applied flexibly and liberally to permit substitution of the party  
 28 or parties who . . . would adequately represent [the decedent's] interests." Smith v. Specialized  
 Loan Servicing, LLC, No. 16cv2519-GPC(BLM), 2017 U.S. Dist. LEXIS 148641, at \*6 (S.D.

1 Cal. Sept. 13, 2017) (quoting *In re Baycol Prods. Litig.*, 616 F.3d 778, 789 (8th Cir. 2010)). “In  
 2 deciding a motion to substitute under Rule 25(a)(1), a court must consider whether: (1) the  
 3 motion is timely; (2) the claims pled are extinguished; and (3) the person being substituted is  
 4 a proper party.” *Veliz v. Cintas Corp.*, No. C 03-1180 RS, 2008 U.S. Dist. LEXIS 79833, at \*1  
 5 (N.D. Cal. July 17, 2008). If satisfied, “[t]he substituted party steps into the same position as  
 6 [the] original party.” *Hilao v. Estate of Marcos*, 103 F.3d 762, 766 (9th Cir. 1996). Here, the  
 7 Motion is timely, and the action cannot be dismissed as there are additional Plaintiffs with  
 8 standing to represent the Settlement Class.

9 First, this Motion is timely. Immediately preceding the filing of this Motion, the Court  
 10 was notified of Farrell’s passing by the filing of a written statement of the fact of death  
 11 accompanied by the death certificate. [DE 98] *See* Fed. R. Civ. P. 25(a)(1). This Motion is  
 12 being filed within 90 days of that statement.

13 Second, Farrell’s claims in this action are not extinguished. In California, the  
 14 survivorship statute found at Cal. Civ. Proc. Code § 377.34 permits recovery for damages the  
 15 decedent sustained or incurred before death. Farrell’s claims arose and were settled, subject  
 16 to this Court’s approval, prior to her death and are not extinguished satisfying the second  
 17 question.

18 Third, the Farrell Children are a proper party for substitution. The sole question under  
 19 Rule 25(a)(1) “who may be considered a decedent’s successor” and that question is answered  
 20 in section 377.11 where a successor is defined as “the beneficiary.” *In re Baycol Prods. Litig.*,  
 21 616 F.3d at 787-88 (“Under California law, a successor is defined as ‘the beneficiary,’ and for  
 22 purposes of Fed. R. Civ. P. 25(a)(1), this is the end of the inquiry under California law.”).  
 23 [B]eneficiary of the decedent’s estate means: “If the decedent died without leaving a will, the  
 24 sole person or all of the persons who succeed to a cause of action, or to a particular item of  
 25 property that is the subject of a cause of action, under Sections 6401 and 6402 of the Probate  
 26 Code or, if the law of a sister state or foreign nation governs succession to the cause of action  
 27 or particular item of property, under the law of the sister state or foreign nation.” Cal. Civ.  
 28

1 Proc. Code § 377.10(b). Here, Farrell passed away intestate with no spouse and is only  
 2 survived by the Farrell Children. *See* Cal. Pro. Code 6402(a) (noting if the decedent passes  
 3 with no surviving spouse the entire intestate estate passes equally to the issue of the decedent).  
 4 All of the Farrell Children consent to the pursuit of this litigation and to serving  
 5 Plaintiffs/Class Representatives. Therefore, the Farrell Children may pursue the claims in this  
 6 action and recover such damages as Farrell would have been entitled to if she were living.

7 Furthermore, in class action lawsuits,

8 [i]f the class representative dies during the pendency of the litigation, the court  
 9 may approve the estate's representative as a substitute class representative  
 10 upon a showing that (a) all beneficiaries of the estate consent to the pursuit of  
 11 the litigation; and (b) the executor of the estate avers that the estate will not  
 bear the costs of the litigation.

12 1 McLaughlin on Class Actions §4:36 (11th ed.) (citing *Negrete v. Allianz Life Ins. Co. of North*  
 13 *America*, 2013 WL 3353852, \*4 (C.D. Cal. 2013)). As previously explained, the Farrell Children,  
 14 the only beneficiaries, consent to the pursuit of this litigation. Accordingly, the Court should  
 15 approve the Farrell Children as a substitute for Joanne Farrell as a class representative.

16 Farrell's claims survive her death, and the Farrell Children are a proper party to be  
 17 substituted in place of Joanne Farrell a class representative.

18 Bank of America does not oppose this motion solely to the extent that it seeks to  
 19 substitute the Farrell Children as plaintiffs strictly for the limited purpose of effectuating the  
 20 Settlement of this Action, without prejudice to its rights to oppose their standing in the event  
 21 the Settlement does not become effective in accordance with the terms of the Settlement  
 22 Agreement, and the Effective Date (as defined in the Settlement Agreement) does not pass  
 23 and the Parties are left to litigate the merits. The Farrell Children agree to this condition,  
 24 reserving their right to litigate the merits of the Farrell's claim if Final Approval is not granted.

25 **III. CONCLUSION**

26 For the reasons set forth above, this Motion should be granted and the Farrell Children  
 27 should be substituted as additional Plaintiffs and Class Representatives for the limited purpose  
 28 of effectuating the Settlement of this Action.

1 Dated: May 25, 2018

Respectfully submitted,

2 /s/ Jeff Ostrow

3 Jeff Ostrow (*pro hac vice*)

ostrow@kolawyers.com

4 **KOPELOWITZ OSTROW**

5 **FERGUSON WEISELBERG GILBERT**

6 1 West Las Olas Blvd., Suite 500

7 Fort Lauderdale, FL 33301

8 Tel.: (954) 525-4100

9 Fax: (954) 525-4300

10 /s/ Hassan A. Zavareei

11 Hassan A. Zavareei (SBN 181547)

12 hzavareei@tzlegal.com

13 **TYCKO & ZAVAREEI LLP**

14 2000 L Street, N.W., Suite 808

15 Washington, DC 20036

16 Tel.: (202) 973-0900

17 Fax: (202) 973-0950

18 *Counsel for Plaintiffs and the Settlement Class*

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